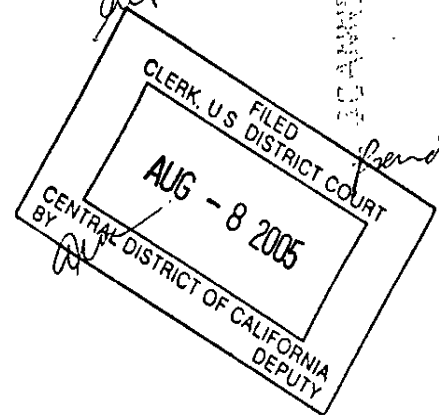


GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
DOMINIC LANZA, SBN 225989
MICHAEL H. DORE, SBN 227442
333 South Grand Avenue,
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
Email: mdore@gibsondunn.com

Attorneys for Dow Jones & Company,
Inc.



UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IRVING KOTT,

Defendant.

CR No.: 03-739(A) FMC

**DOW JONES AND COMPANY,
INC.'S *EX PARTE* APPLICATION
RE: ISSUANCE OF MANDATE,
DISSOLUTION OF STAY, AND
UNSEALING OF DOCUMENTS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; [REDACTED] ORDER;
DECLARATION OF DOMINIC
LANZA**

PLEASE TAKE NOTICE that on August 5, 2005, by submission to the Honorable Florence-Marie Cooper of the United States District Court for the Central District of California, Intervenor Dow Jones & Company, Inc. ("Dow Jones") will and hereby does apply *ex parte* for the Court to dissolve the stay of its order unsealing the Indictment and search warrant materials in the above-captioned matter, and to unseal and release said documents in accordance with that order.

This *ex parte* application complies with Local Rule 7-19. On August 1, 2005, counsel for Dow Jones advised Plaintiff's counsel, George Cardona, and Defendant's counsel, Ellyn Garofalo, of Dow Jones's intention to make this application. Both parties have indicated that they will file no further appeals in this matter.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DOW JONES'S *EX PARTE* APPLICATION**

The time has come to unseal the Indictment and search warrant materials in this case. As shown below, this Court is now vested with jurisdiction to dissolve the stay and to effectuate its prior unsealing order.

A. The Court Now Has Jurisdiction To Dissolve The Stay.

On November 5, 2004, this Court issued an order granting Dow Jones's motion to unseal the Indictment and search warrant materials, but also granted Mr. Kott's request for a stay pending appeal.

On June 15, 2005, the Ninth Circuit issued a decision affirming the Court's order to unseal the documents.

On July 25, 2005, the Ninth Circuit issued an order denying Mr. Kott petitions for rehearing and rehearing *en banc*.

On August 1, the Ninth Circuit issued its mandate, thereby vesting this Court with jurisdiction to dissolve the stay and to effectuate its prior order. (The issuance of mandate is now reflected on PACER, for Ninth Circuit Case No. 04-50551). Moreover, both Mr. Kott and the government have indicated that they do not intend to further appeal.

B. Good Cause Exists To Grant This *Ex Parte* Application.

Good cause exists for this *ex parte* application. *See, e.g., In re Intermagnetics America, Inc.*, 101 B.R. 191, 193 (C.D. Cal. 1989) (*ex parte* application is "legitimate" when "there is some urgency such that 'immediate and irreparable injury, loss, or damage will result'" absent expedited treatment) (citation omitted).

Under well-established access principles, "each passing day" on which the documents remain sealed may constitute an irreparable injury to Dow Jones. *See, e.g., Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (The "Supreme Court has made clear that '[t]he loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (“[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.”) (Blackmun, J., in chambers). See generally *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“[A]ccess should be immediate and contemporaneous. The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”) (citation omitted); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasizing “the critical importance of contemporaneous access . . . to the public’s role as overseer of the criminal justice process”); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (even a forty-eight hour delay in unsealing judicial records “is a total restraint on the public’s first amendment right of access even though the restraint is limited in time”); *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972) (“Timeliness of publication is the hallmark of news.”)

C. Request For Relief.

If possible and convenient to the Court, Dow Jones respectfully requests that the Court release a copy of the documents via facsimile to Michael H. Dore at Gibson, Dunn & Crutcher, LLP, at the fax number (213) 229-6085. If the documents are too voluminous, or if this procedure is otherwise inconvenient, Dow Jones will arrange to retrieve the unsealed documents from the court.

Counsel for Plaintiff is George Cardona; Chief Assistant United States Attorney; 1100 United States Courthouse; 312 North Spring Street; Los Angeles, CA 90012. Mr. Cardona's business telephone number is (213) 894-8323.

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1 Counsel for Defendant is Ellyn Garofalo; Liner Yankelevitz Sunshine & Regen-
2 streif LLP; 1100 Glendon Avenue, 14th Floor; Los Angeles, CA 90024. Ms. Garo-
3 falo's business telephone number is (310) 500-3500.

4 DATED: August 5, 2005

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Dominic Lanza
Michael H. Dore

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8 By: 

Michael H. Dore

9 Attorneys for Dow Jones & Company, Inc.
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333 South Grand Avenue,
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Attorneys for Dow Jones & Company,
Inc.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,
vs.

IRVING KOTT,
Defendant.

CR No.: 03-739(A) FMC

**[REDACTED] ORDER GRANTING
DOW JONES AND COMPANY,
INC.'S *EX PARTE* APPLICATION
RE: ISSUANCE OF MANDATE,
DISSOLUTION OF STAY, AND
UNSEALING OF DOCUMENTS**

The *Ex Parte* Application Re: Issuance of Mandate, Dissolution of Stay, and Unsealing of Documents was submitted to the above-referenced Court on August 5, 2005, before the Honorable Florence-Marie Cooper, United States District Court Judge. No appearances of counsel were necessary.

The Court having considered the *Ex Parte* Application and supporting papers, IT IS HEREBY ORDERED, that Dow Jones's *Ex Parte* Application Re: Issuance of Mandate, Dissolution of Stay, and Unsealing of Documents is GRANTED and that the Court will unseal the Indictment and search warrant materials.

DATED: Aug 8, 2005



Florence-Marie Cooper

United States District Judge

DECLARATION OF DOMINIC LANZA

I, Dominic Lanza, declare as follows:

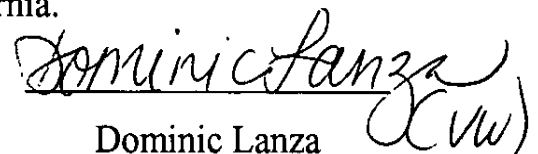
1. I am an attorney duly licensed to practice law before all of the courts of the State of California and this Court. I am an associate at Gibson, Dunn & Crutcher LLP ("GD&C"), attorneys of record for Intervenor Dow Jones & Company, Inc. I make this declaration on the basis of personal knowledge and if called to testify as a witness, I would and could testify competently hereto.

2. On June 16, 2005 – the day after the Ninth Circuit issued its decision affirming the unsealing order – I telephoned George Cardona, counsel for Plaintiff, and left a message giving notice of Dow Jones's intention to file this *ex parte* application. On June 17, 2005, I spoke with Mr. Cardona, who advised me that, although the government would not oppose the unsealing of the documents once the Ninth Circuit issues its mandate, the government would oppose unsealing until that time.

3. On August 1, 2005, as a courtesy, I telephoned Mr. Cardona and left a voicemail message giving notice of Dow Jones's intention to file this *ex parte* application and inquiring whether the government wished to oppose. I have not heard back from Mr. Cardona, but I believe that no further confirmation from the government is necessary in light of the position previously taken on June 17.

4. On August 1, 2005, I telephoned Ellyn Garofalo, counsel for Defendant, and gave notice of Dow Jones's intention to file this *ex parte* application. Ms. Garofalo advised me that her client, Mr. Kott, does not intend to file any further appeals in this matter.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 2d day of August, 2005, at Los Angeles, California.


Dominic Lanza

CERTIFICATE OF SERVICE

I, Jess Fernandez, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071, in said County and State; I am employed in the office of Michael H. Dore, a member of the bar of this Court, and at his direction, on August 5, 2005, I served the following:

DOW JONES AND COMPANY, INC.'S *EX PARTE* APPLICATION RE: ISSUANCE OF MANDATE, DISSOLUTION OF STAY, AND UNSEALING OF DOCUMENTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; PROPOSED ORDER; DECLARATION OF DOMINIC LANZA

on the interested parties in this action, by:

☒ **Service by Hand Delivery:** delivering true and correct copy thereof and sufficient envelope(s) addressed to the attorney(s) of record, addressed as follows:

**George Cardona
Chief Assistant United States Attorney
Central District of California
1100 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012**

Tel.: (213) 894-8323

Counsel for Plaintiff United States of America

**Ronald Cheng
Assistant United States Attorney
Chief, Criminal Appeals
Central District of California
1100 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012**

Counsel for Plaintiff United States of America

1 **Ellyn S. Garofalo**
2 **Liner Yankelevitz Sunshine**
3 **& Regenstreif LLP**
4 **1100 Glendon Avenue, 14th Floor**
5 **Los Angeles, CA 90024**

Tel.: (310) 500-3500
Fax: (310) 500-3501

Counsel for Defendant Irving Kott

6 **Brian A. Sun**
7 **Jones Day**
8 **555 West 5th Street, Suite 4600**
9 **Los Angeles, CA 90013**

Tel.: (213) 243-2858
Fax: (213) 243-2539

Counsel for Defendant Irving Kott

10 to a messenger or messengers for personal delivery.

11 I certify under penalty of perjury that the foregoing is true and correct, that
12 the foregoing document(s), and all copies made from same, were printed on recy-
13 cled paper, and that this Certificate of Service was executed by me on August 5,
14 2005 at Los Angeles, California.

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Jess Fernandez